CHIN KEON LIM

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CRIMINAL APPEAL NO. 01 OF 1991]
8 SEPTEMBER 1995

EVIDENCE: *Alibi - Evidence in support of alibi - Failure to comply with s. 402A of the Criminal Procedure Code - Evidence rejected in totality - Whether a miscarriage of justice - Whether evidence should have been given consideration.*

This was an appeal by the appellant against his conviction and sentence for an offence under s. 429 of the Penal Code F.M.S. Cap. 45.

The Magistrate in the lower Court had rejected the evidence given by the defence witnesses that the appellant was with them in their mother's house at the material time. According to the Magistrate, the evidence, which was in support of an alibi, was not admissible due to non-compliance with the provision of s. 402A of the Criminal Procedure Code. Counsel for the appellant submitted that the learned Magistrate had erred when he rejected in totality the appellant's defence.

The appellant had also adduced further evidence in respect of a statutory declaration (D1) given to him by Kimin Norain (PW3) made before the commissioner for oaths. According to PW3 he signed D1 at the lawyer's office and not before the commissioner for oaths. PW3 admitted that he was a little drunk on the day further evidence was recorded.

Held:

[1] The Magistrate should have rejected those evidence relating to the defence of alibi only and considered other parts of the appellant's evidence. Due to this failure there has been a miscarriage of justice.

[2] On the day of the recording of further evidence PW3 stated that "saya ada mabuk sedikit". These are matters of credibility and demeanour of witnesses which are matters for the learned trial Magistrate to consider and come to a proper finding whether PW3 had given false evidence at the trial. It is a question of fact for the trial Magistrate to make proper findings on the credibility of the witnesses.

[Appeal allowed; conviction and sentence set aside; retrial ordered].

Cases referred to:
Vasan Singh v. PP [1988] 3 MLJ 412 ***(refd)***
Chong Peng v. PP [1954] 2 MLJ 39 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 399, 402A, 427(I)
Penal Code FMS Cap. 45, s. 429

For the appellant - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the respondent - Mohd. Yazid bin Mustapha, SFC
For the respondent - Osman bin Ujang, DPP

JUDGMENT

Tee Ah Seng JC:

The appellant appeals against his conviction and sentence on the 1st charge as follows:

> That you on or about 31 October 1987 at about 9 pm at Kampung Ansip, in the district of Keningau, in the state of Sabah committed mischief by poisoning 19 cows valued at about RM57,000 (Malaysian Ringgit Fifty Seven Thousand Only) belonging to one Yap Yun Foor (M) I/C H 0476686 and you have thereby committed an offence punishable under s. 429 of the Penal Code FMS Cap. 45.

On 13 May 1995 I ordered that the type written appeal record be amended to confirm with the manuscript notes of proceedings.

In the light of the updated notes of proceedings received from the Magistrate's Court at Keningau, the learned Counsel for the appellant withdrew his submission on the alibi notice under s. 402A of the Criminal Procedure Code on the ground that the appellant was tried on the very same day he was charged with the offence. However, he submitted that the learned Magistrate erred when he rejected in totality the appellant's defence.

In *Vasan Singh v. PP* [1988] 3 MLJ 412 his Lordship Harun SCJ (delivering the judgment of the Supreme Court) at p. 414 said:

> The defence of alibi is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with s. 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of a bare denial is in any case always admissible. In order to distinguish one from the other, the Court must know the nature of the evidence. As was said in *Ku Lip See v. PP* [1982] 1 MLJ 194 at p. 196:
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> > If a trial Court having considered the evidence put forward by the defence holds that such evidence amount to evidence in support of an alibi for which no notice under s. 402A of the Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence. (Emphasis supplied).
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> If follows that, initially, the Court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial Court must decide the nature of the evidence. If it is only evidence in support of an alibi and no notice under s. 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.
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> In the instant case, the trial Magistrate correctly recorded the evidence of the applicant but was wrong to exclude it from the defence evidence because what the applicant said (that he was not involved in the fight and was in bed) is a bare denial of the charge. Had the applicant gone further and proposed to call his wife to corroborate his evidence, then that would be evidence in support of the defence of alibi and the evidence should be excluded.
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> Likewise in the example given, the accused is entitled to say that he was travelling at the material time (which is a bare denial) but if he proceeded to produce his ticket or passport to support his alibi but not calling any other witness that would be evidence in support of an alibi and unless pre-trial notice has been given, that evidence should be excluded from the Court's consideration.

a On the facts of this case, we hold that both the trial Magistrate and the appellate Judge were in error in excluding the applicant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial.

The appellant (DW1) testified that on 31 October 1987 at about 7.00 p.m. he was in his house. b At about 7.30 his sister's and his brothers' family came. That night they watched TV and video. He did not go out. Nobody came and saw him that night. Kimin did not come and see him. So they were all one family watching TV, video and chit chatting. About 10.00 p.m. he went to bed. At the time when he went to bed his sister, his brother, his brother-in-law and his mother were still there.

c The defence called DW2, DW3 and DW4 to testify.

However the evidence of Chi Wi Nyap (DW2) Chin Ken Chung (DW3) and Chin Ken Lan (DW4) that on 31 October 1987 that they were with the appellant in the mother's house from 7.30 p.m. and that the appellant did not go out and they were with the appellant until the appellant went to bed at about 10 p.m. are evidence in support of an alibi and therefore not d admissible.

The learned Magistrate at p. 94 of the appeal record stated that "due to the non-compliance with the provision above mentioned the defence given by all the defence witnesses could therefore be given no weight at all by this Court."

e I am of the view that the learned Magistrate was in error when he rejected the appellant's defence in totality.

What the learned Magistrate should have done is to reject those evidence relating to the defence of alibi only. He should have considered other parts of the appellant's evidence. I am of the view that due to this failure there has been a miscarriage of justice. On this ground I would set aside the conviction and sentence on the 1st charge. I have given serious f consideration whether I should order a retrial on the 1st charge. I am of the view that in the interest of justice a retrial is the only proper order in respect of the 1st charge.

Further evidence was adduced in respect of a statutory declaration (Exhibit "D1") made by Kimin Norain on 8 January 1991 before the commissioner for oaths, Mr. Joseph Abin Lianjun.

g Joseph Abin Lianjun, testified that on 28 January 1991 Kimin Norain came to see with "D1" for attestation. Before attestation Joseph Abin Lianjun read the contents of "D1" before asking Kimin to sign it. He also warned Kimin Norain that it may constitute an offence under the law but Kimin Norain insisted on signing it even though the consequences were explained.

On the other hand Kimin bin Norain when giving evidence stated that "saya ada mabuk h sedikit" when testifying at the recording of further evidence. However Kimin bin Norain stated that he signed "D1" at the office of lawyer Ron Chin. After signing "D1" Ron Chin brought him to the Court and the Hakim signed it. The Hakim he referred to is Joseph Abin Lianjun.

Kimin also stated that on 28 January 1991 the appellant and his brother-in-law, Chu Vui Yet invited him to go to Kota Kinabalu and he followed them. He said that Chu Vui Yet and the i appellant's brother took him to Ron Chin's office but the appellant did not go to Ron Chin's office.

The appellant and Chu Vui Yet denied that they took Kimin Norain to Kota Kinabalu on 28 January 1991 to see Ron Chin. Ron Chin has stated that on 28 January 1991 he did not see Kimin Norain or Chu Vui Yet or any other person related to appellant in his office. Ron Chin stated he did not prepare "D1". He also stated that he did not see Joseph Abin Lianjun on 28 January 1991 nor did he request Joseph Abin Lianjun to attest any document. According to Ron Chin the appellant had handed to him "D1" after the notice of appeal and the petition of appeal were filed.

The appellant in his further evidence stated that on 30 January 1991 Kimin Norain had given him "D1" in Keningau which he subsequently handed to Ron Chin.

It should be noted that on the day of recording of the further evidence, Kimin admitted that he was drunk. He was brought to the Court house by Yap Ah Fook, the complainant at the trial who had personal interest in the matter.

So the issue is whether Kimin (PW3) has signed "D1" before Mr. Ron Chin or before Joseph Abin Lianjun. And further whether PW3 has raised a reasonable doubt that he did not know what he was signing and therefore disputes the contents of "D1". It should also be noted that on the day of the recording of the further evidence PW3 stated that "Saya ada mabuk sedikit". These are matters of credibility and demeanour of witnesses which are matters for the learned trial Magistrate to consider and come to a proper finding whether PW3 had given false evidence at the trial.

It should also be noted that at the further recording of fresh evidence 5 witnesses were called to testify.

So it is a question of fact for the trial Magistrate to make proper findings on the credibility of the witnesses.

In view of the aforesaid I am of the opinion that a retrial on the first charge should be ordered.

I shall also deal with the other grounds of appeal.

I agree with the contention of the learned Counsel for the appellant that exhibits Ex. P3, Ex. P4, Ex. P5 are not admissible being in violation of s. 399 of the CPC because no evidence was adduced that these exhibits were served on the appellant not less than 10 days before the commencement of the trial.

In *Chong Peng v. PP* [1954] 2 MLJ 39 Bellamy J at p. 40 said:

> To render the report admissible in evidence the prosecution must first satisfy the Court by oral evidence that the provisions of the proviso to s. 427(I) have been complied with, that is to say, that a copy thereof has been delivered to the accused within the time stipulated in the proviso, and until the prosecution has done this the report cannot be received in evidence. In the absence of such proof, the document is inadmissible; and until such proof is forthcoming it should only be marked for identification. In the present case there was no proof of such delivery of a copy of the report of the chemist to the appellant, and it follows that, that being my view, the report of the chemist should not have been received in evidence.

Therefore I hold that exhibits Ex. P3, Ex. P4, Ex. P5 are inadmissible in evidence.

The learned Counsel for the appellant submitted that the learned Magistrate erred in law and in fact in accepting evidence regarding the identity of the appellant in the light of the fact that the evidence of identity is poor.

At p. 100 of the appeal record the learned Magistrate stated:

> The Court believes that to open the bamboo gate that obstructs the entrance to PW1's farm, one were to take a few minutes to do so. Within that period of time, with the head light on and having seen PW3 and accused before including accused's pick-up, the Court thinks that it is long enough a period for the witnesses in question to make an observation and identity the accused even though the sulap was at a distance. Therefore their identification cannot be rejected outright.

From the grounds of decision of the learned Magistrate it is clear that PW8 and PW9 have seen PW3 and the appellant before the incident a number of times at the Jabatan Haiwan. They have also seen the pick up a number of times.

I am of the view that the learned Magistrate was correct in coming to the conclusion that the appellant was correctly identified. This is a case of recognition not mere identification.

In conclusion I allow the appeal and set aside the conviction and sentence on the 1st charge and I hereby order a retrial on the 1st charge before another Magistrate as the learned Magistrate who heard this case has been transferred and appointed a deputy public prosecutor. I order that this case be fixed for mention in the Magistrate's Court at Keningau on 15 September 1995 at 9 a.m.